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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PORFIRIO ENRIQUE COLLADO,

Defendant and Appellant.

G033296

(Super. Ct. No. 03WF0562)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Kenneth H. Nordin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Lilia E. Garcia, Deputy Attorney General, for Plaintiff and Respondent.

Porfirio Enrique Collado appeals from a judgment after a jury convicted him of inflicting corporal injury on his spouse and felony child abuse. Collado argues there was instructional error and insufficient evidence supports his conviction for felony child abuse. We find no merit in his contentions and affirm.

FACTS

Collado, Julia Collado, his wife, and two of her children, Federico L. (16 years old), and Joanna L. (12 years old), were home when Collado and Julia started arguing. Federico, an offensive tackle on his high school football team, was in his room when he heard them. Federico heard what sounded like “a hit” and went into the living room. He noticed his mother had some type of eye injury.¹

Federico saw Collado and his mother arguing and Joanna sitting on the love seat crying. Julia was sitting on the couch and Collado was standing in front of her. Federico told Collado to “calm down,” and Collado and Julia told him to “stay out of it.” Collado told Federico to “get out of [there],” and Collado pushed him. Federico pushed Collado. Federico was taller and heavier than Collado.

Collado, a former boxer, punched Federico in the face with a closed fist, but not very hard. Collado had a ring on his finger. Federico punched him in the face, and they started fighting. Collado and Federico fell on a coffee table and broke it. Collado punched Federico in the face 10 times. Federico punched Collado “about the same number of times.” Julia could not stop them from fighting, and she called 911.²

Collado stopped hitting Federico, and Federico also stopped fighting. Federico had abrasions, scratches, and bumps on his face, and Collado had a bloody nose.

Westminster Police Officer Alfred Brackett responded to the call and found Julia “holding a towel to the left side of her head”; the towel was bloody. Julia had a half-inch cut above her left eyebrow. When Brackett arrived, Julia said, “it was a misunderstanding, [and] everything was okay.” Julia also stated Collado had beaten her

¹ Julia had a bruise under her left eye and a laceration over her left eye. Federico testified it was her right eye.

² Peggie O’Rourke, the Westminster Police Department dispatcher, stated Julia described an assault that was in progress and she was “hysterical and panicked and upset.” O’Rourke said “there was . . . screaming and chaos” in the background.

pretty badly seven years before this incident. Julia said, ““Because you know what? He had -- I mean, we -- we both -- I mean, we both went to counseling after this. And you know what? Out of seven, seven years we’ve been together, he’s only done this once. This is the only -- only the second time”” Julia added, ““You know, and then that builds up. And then I met him, of course, you know, which I’m glad he did beat the shit out of me, you know, because it knocked me out of my -- my stuff I was doing, you know. Thank God.””³ Julia would not let Brackett photograph her, so he did it secretly from across the room.

The day after the incident, social services took Federico and Joanna into protective custody. A few days later, Westminster Police Detective Clifford Williams interviewed Julia. Julia told him Collado was upset with her because he thought she vandalized his truck and had been smoking. Julia said when Collado came home from work, “she unlocked [the door], [Collado] struck her with his right fist hitting her left eye and causing it to bleed.” Julia stated “she sat on the sofa . . . and held up her legs to defend herself[.]” She said Federico came into the living room and stood between her and Collado so she could escape down the hallway, which she did. Julia stated she heard yelling and hitting and went back into the living room. Julia said she saw Collado hitting Federico in the face. Julia stated she tried to separate them, but she could not because Collado was a former boxer and her son is heavyset. Julia said she kicked Collado twice, but it did not stop them so she called 911. Williams asked her why, on the day of the incident, she said Collado did not hit her, she had fallen and hit her head, and ““[she] was trying to protect [her] son and [her] husband[.]””

An information charged Collado with inflicting corporal injury on his spouse (Pen. Code, § 273.5, subd. (a))⁴ (count 1), and felony child abuse (§ 273a, subd.

³ Brackett recorded Julia’s statements. The cassette and transcript were marked for identification, but they were not admitted into evidence.

⁴ All further statutory references are to the Penal Code.

(a)) (count 2). Collado did not testify at trial. The 911 tape was played for the jury and they received a transcript of the call. We include it in relevant part:

“Dispatcher: What’s the matter?

“[Julia]: My husband’s beating up my son and he’s . . . crack my head, hurry up! Hurry up!

“Dispatcher: How old is your son?

“[Julia]: [15]! And then he . . . crack my head. Hurry up! They’re bleeding . . .

“Dispatcher: Yes, ma’am, we’re on the way.

“[Julia]: Hurry up . . . and he just cut my side open.

“Dispatcher: What happened? Who’s bleeding?

“[Julia]: I am. And now he’s hitting my son! And it’s not even his son!

“Dispatcher: Ma’am, what is, what is his name?

“[Julia]: My husband is beating up my son.

“Dispatcher: I know that. What is his name?

“[Julia]: Porfirio.”

Julia testified she did not remember making any of the statements in the 911 call. Julia, a former smoker, stated she and Collado were having a discussion about some cigarettes he found in the trash can when Federico came out of his bedroom and calmly asked what they were talking about. She claimed Joanna was in one of the bedrooms watching television. Julia said Federico told them to quit arguing, and Collado responded, ““Okay, mijo. I’m sorry.”” Julia then explained how Federico was injured: ““And when [Collado] was backing up, he was so close to the table that he tripped, he almost was falling, grabbed my son’s shoulders like this . . . with his -- with his hands because he was going to fall and then they both fell on top of each other. Then he hit the side of his face on the couch, and then when my son fell, either he hit the elbow or his back of his head on my husband’s nose.”” Julia then explained how she was injured: “I

got kind of like nervous because I thought they were fighting because with my nerves, I ran, tripped, and when I was going to run to get the phone, I trip over my carpet, hit the corner of the wall, and there is this mark where I hit” Julia attributed her statements on the 911 call to nervousness, confusion, and light-headedness after falling and hitting her head. She concluded by saying that although she did not make those statements on the 911 call, her comment Collado was hitting Federico was a result of nerves.

On cross-examination, Julia testified she called 911 twice, the second time to cancel the call. Julia stated she told officers she hit her head on the wall, and she did not tell them Federico confronted Collado. She denied hitting or kicking Collado on the day of the incident. Julia said Williams told her if she did not admit Collado hit her and Federico she would never get her children back.⁵ Julia stated she told Williams that Collado hit her and Federico “so [she] could have [her] kids back, and that wasn’t the truth.”

Joanna testified she was in the living room watching television when Collado came home. Joanna stated she heard a sound and assumed it was the metal screen door hitting the wall. After she heard the sound, Joanna said she looked up from the television. Joanna stated she did not see Collado hit her mother. Joanna said that when Federico came out of his room he asked ““what was going on[]”” and Collado “pushed him on accident.” Joanna stated this made Federico mad, and they started fighting and fell on the coffee table. Joanna said her mother tried to stop them from fighting and “she . . . fell and hit the wall” and cut her head. Joanna stated she did not see any blood on her mother’s head until after she tried to stop Collado and Federico from fighting.

The district attorney asked Joanna whether she told one of the officers ““yeah, he hit *him* like this[,]”” Joanna stated, “But like back then I -- like I assumed

⁵

Williams denied this at trial.

because I didn't -- [Federico] saw her hit the wall, but then I was busy like looking at [Collado] and [Federico] to see like, you know, what's going on. So I assumed that he did hit her, but then [Federico] said, 'No,' because she hit the wall." In response to the district attorney's questions concerning whether she remembered if officers asked her if Collado hit her mother with a fist, Joanna said she remembered telling them, "with a fist."

On cross-examination, Brackett testified Julia told him she tried to stop Collado and Federico from fighting and she hit her head on the wall. Brackett stated he did not call for medical treatment and he did not think Federico's injuries required medical treatment.

Ernestina Mijangos, Collado's former live-in girlfriend, also testified. She stated that in April of 1994 she and Collado argued and he hit her on the head with an open hand two or three times and with a closed fist once. The parties stipulated Collado was convicted of one count of domestic violence in 1994 for this incident, and two counts of domestic violence in 1997 for incidents occurring in 1996 and 1997 involving Julia.

The jury convicted Collado on both counts. The trial court sentenced Collado to the lower term of two years on count 2 and one-third of the middle term of three years on count 1 to run consecutively to count 2 for a total of three years.⁶

DISCUSSION

1. Jury Instruction

Collado argues the trial court committed prejudicial error when it did not instruct the jury sua sponte with CALJIC No. 4.45, Accident and Misfortune, or an instruction tailored to the case, as to count 1. Additionally, Collado claims "since the defense of accident 'is one that negates proof of an element of the charged offense,' the

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At trial, Julia denied Collado hit her on these occasions as well.

court should have further instructed the jury that [Collado] must be acquitted on count 1 if the evidence of accident raised a reasonable doubt as to the existence of the mental states required for the crime of spousal abuse, general intent and willfulness.” Neither of his contentions have merit.

“The trial court has a duty to instruct sua sponte regarding a defense “only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant’s theory of the case.” [Citation.] [W]hen the trial court believes “there is substantial evidence that would support a *defense* inconsistent with that advanced by a defendant, the court should ascertain from the defendant whether he wishes instructions on the alternative theory.” [Citation.]’ [Citation.] [¶] When a defense is one that negates proof of an element of the charged offense, the defendant need only raise a reasonable doubt of the existence of that fact. [Citation.] This is so because the defense goes directly to guilt or innocence. The trial court is required to instruct the jury on which party has the burden of proof and on the nature of that burden. [Citations.] The accident defense is a claim that the defendant acted without forming the mental state necessary to make his actions a crime. [Citation.]” (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 389-390 (*Gonzales*).)

Our job is to determine whether substantial evidence supported giving CALJIC No. 4.45. We conclude it did not.

Count 1 charged Collado with inflicting corporal injury on Julia in violation of section 273.5, subdivision (a).⁷ CALJIC No. 4.45 states: “When a person commits an act or makes an omission through misfortune or by accident under circumstances that show [no] [neither] [criminal intent [n]or purpose,] [nor] [[criminal] negligence,] [he]

⁷ Section 273.5, subdivision (a), states: “Any person who willfully inflicts upon a person who is his or her spouse . . . corporal injury resulting in a traumatic condition, is guilty of a felony”

[she] does not thereby commit a crime.” Section 26, paragraph 5, states: “All persons are capable of committing crimes except those belonging to the following classes:

[¶] . . . [¶] Five—Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.”

Relying on *Gonzales, supra*, 74 Cal.App.4th 382, Collado argues there was substantial evidence (Julia’s and Joanna’s testimony, and defense counsel’s argument) to support his claim Julia was injured by accident. We disagree.

In *Gonzales*, the victim testified her injuries were caused by an accident. She claimed the door struck her as she was leaving the room and the defendant was entering it. She said the defendant did not assault her, and she denied he “grabbed her by the hair, hit her in the face, threw her against the wall, kicked her in the legs, or punched her in the stomach.” (*Gonzales, supra*, 74 Cal.App.4th at p. 385.) The defendant’s brother testified the victim had told him she had been hit by the door and her injury was caused by an accident. The defendant’s mother testified the victim said “she accidentally hit her head on the [door]” when defendant entered the room. (*Id.* at p. 386.) During closing argument, defense counsel argued the victim’s injuries had been caused by defendant accidentally opening the door as the victim was coming out the door. (*Id.* at pp. 386-387.) The *Gonzales* court reversed defendant’s conviction because there was substantial evidence to support the defense of accident and the trial court did not give the instruction sua sponte. (*Id.* at p. 390.)

In the case before us, both Julia and Joanna testified Julia injured herself when she hit the wall. Julia stated that as she ran to the telephone she tripped and hit her head on the wall. Joanna stated Julia tried to stop Collado and Federico from fighting “and then she hit the wall.” Neither of them said Collado pushed her, and therefore, their testimony was not evidentiary support warranting an instruction of accident.

Joanna also suggested Julia was injured by either Collado or Federico. Joanna stated, “I guess *they* pushed her” and Julia was injured when she tried to push “*them* away.” Collado paints Joanna’s “guesses” as figures of speech similar to “like.” Aside from the fact Joanna’s testimony was indecisive, she never testified Collado pushed Julia and caused her injuries. Joanna’s testimony was vague and ambiguous, and it was different from what she told officers the day of the incident. Joanna’s testimony was not evidentiary support warranting an instruction of accident.

In any event, although we do not find error, the trial court’s failure to instruct the jury sua sponte with CALJIC No. 4.45 was harmless even under the more stringent *Chapman v. California* (1967) 386 U.S. 18, standard. (*People v. Mower* (2002) 28 Cal.4th 457, 484.) We conclude beyond a reasonable doubt the trial court’s failure to instruct sua sponte on the defense of accident did not contribute to Collado’s conviction for inflicting corporal injury on Julia. The jury heard the 911 telephone call where Julia stated Collado hit her. The jury also saw the photographs of her injuries. She made inconsistent statements to the police and at trial. Additionally, Collado had three previous convictions for domestic violence. As to defense counsel’s statements during closing arguments concerning how Julia was injured, they are not evidence. (CALJIC No. 1.02.)

2. *Sufficiency of Evidence-Section 273a, subdivision (a)*

Collado concedes there was sufficient evidence to support a conviction for “misdemeanor child endangerment.”⁸ However, he argues there was insufficient

⁸ The trial court instructed the jury with the following instructions concerning count 2: CALJIC No. 9.37, Child Abuse/Neglect/Endangerment Felony; CALJIC NO. 16.170 Child Abuse/Neglect/Endangerment Misdemeanor; and CALJIC No. 17.10, Conviction of Lesser Included or Lesser Related Offense—Implied Acquittal-First.

evidence to support his “felony child endangerment” conviction because his conduct did not occur under circumstances likely to produce great bodily injury or death and asks this court to reduce his conviction to a misdemeanor and modify his sentence accordingly.

We find there was substantial evidence supporting his conviction for felony child abuse.

“‘The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] ‘Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness’s credibility for that of the fact finder. [Citations.]’ [Citation.]” (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

Section 273a, subdivision (a), makes it a felony for “[a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering [on any child]” Section 273a, subdivision (a), requires the conduct to be: (1) willful, and (2) committed “under circumstances or conditions likely to produce great bodily harm or death.” (*People v. Odom* (1991) 226 Cal.App.3d 1028, 1032.) “[S]ection 273a . . . is intended to protect children from situations in which the ‘probability of serious injury is great.’ [Citation.] The risk need not be life threatening, as long as there are risks of great bodily harm. [Citation.] . . . [Citations.] Further,

‘[f]or the felony punishment there is no requirement that the actual result be great bodily injury.’ [Citations.]” (*Id.* at p. 1033; *People v. Valdez* (2002) 27 Cal.4th 778, 784.)

“‘Great bodily harm refers to significant or substantial injury and does not refer to trivial or insignificant injury.’” (*People v. Cortes* (1999) 71 Cal.App.4th 62, 80.)

Collado claims there was insufficient evidence to support the finding his conduct occurred under circumstances likely to produce great bodily injury or death because: Federico fought back, Federico was taller and heavier, Federico played on his high school football team, Collado did not hit him that hard, Collado stopped fighting first, and Federico’s injuries were “‘trivial or insignificant.’”⁹ Essentially, Collado asks us to reweigh the evidence. That we cannot do. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

There was substantial evidence to support the jury’s finding Collado’s conduct occurred under circumstances likely to produce great bodily injury or death. Although Collado was shorter and lighter than Federico, Collado was a boxer who had the training and skill to inflict great bodily injury. Collado was aggressive and hit Federico in the face 10 times with a closed fist and with a ring on his finger. Collado and Federico fell on a coffee table and broke it. Federico had abrasions, scratches, and bumps on his face. The jury saw Collado, Federico, and photographs showing Federico’s injuries and the broken coffee table. The jury determined Collado’s conduct was “likely to produce great bodily harm,” and this evidence supported their finding. (*People v. Ochoa, supra*, 6 Cal.4th at p. 1206.)

As we explained above, Collado’s conduct must have been “likely to produce great bodily harm” which is defined as significant or substantial injury and not

⁹ Collado, a former boxer, also states that had he really wanted to injure Federico, he would have continued to hit him. We are unsure how failure to inflict additional great bodily harm is dispositive on the issue of whether his conduct was “likely to produce great bodily harm” in the first instance.

“trivial or insignificant” injury. (*People v. Cortes, supra*, 71 Cal.App.4th at p. 80.)

There is no requirement that there be actual great bodily injury. (*People v. Odom, supra*, 226 Cal.App.3d at p. 1032.)

DISPOSITION

The judgment is affirmed.

O’LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.